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In the
Supreme Court of the United States
October Term, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with 120,000 members nationwide. WLF is committed to advancing the free enterprise system and to promoting the principles of judicial restraint involving constitutional and statutory law. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases

affecting business and commerce. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1988); *Tull v. United States*, 107 S. Ct. 1831 (1987); *Pacific Gas & Electric Company v. The Public Utilities Commission of California*, 475 U.S. 1 (1986); and *Parklane Hoisery Company, Inc. v. Shore*, 439 U.S. 322 (1979).

In accordance with Supreme Court Rule 37.1, *amicus* has not reiterated the arguments of the petitioner, but has focused on the issue of whether equitable principles preclude enforcement by the Environmental Protection Agency.

WLF submits this brief on behalf of petitioners with the written consent of both parties pursuant to Rule 37.3.

STATEMENT OF THE CASE

For the sake of brevity and avoidance of duplication of argument, the statement of the case contained in the Petition for Writ of Certiorari is incorporated herein by reference and the argument contained therein is approved.

In this case a person[1] subject to the enforcement powers of two sovereigns is threatened with the imposition of retroactive penalties by one for having complied with the law of the other. General Motors, having complied with the authority of the Commonwealth of Massachusetts, is subjected to a belated enforcement action in which the Environmental Protection Agency (EPA) seeks to have the federal district court, with the imprimatur of the Supreme Court of the United States,

[1]As defined in 42 U.S.C. § 7602(e) (1982).

impose civil penalties upon it notwithstanding that compliance.

The framers of the Constitution anticipated conflict between state and federal law and sought to provide for it in the supremacy clause. U.S. Const., art. VI, cl. 2. The supremacy clause does not, however, invalidate or render unenforceable the Massachusetts law involved in this case, because the federal Congress expressly provided that preemption would not apply except in a narrow band of circumstances, 42 U.S.C. § 7416 (1982).

Moreover, the Commonwealth of Massachusetts acted in part as an agent of the United States in conformance with, and at the invitation of, a federal statute. 42 U.S.C. § 7410 (1982). General Motors, in continuing to operate the Framingham facility past the date specifically blessed by EPA, justifiably and reasonably relied on the representations, deference and failure to perform a statutory duty of one federal agent, EPA, juxtaposed against the actual and apparent authority of another, the Commonwealth of Massachusetts. Equitable principles militate against the imposition of penalties for actions which were based on such reliance.

The following chronology emphasizes the significant order of events underlying this case.

> In 1979, Massachusetts promulgated its SIP regulation requiring full compliance by December 31, 1985. 310 C.M.R. 7.18(7); *see* 40 C.F.R. § 52.1167 (1988).
>
> In 1981, EPA published policy statement advocating deferral of compliance duties to 1986 or 1987. 46 Fed. Reg. 51, 386 (1981).

In 1985, Massachusetts revised its regulations to extend the applicable deadline for compliance to August 31, 1987.

On December 30, 1985, Massachusetts submitted the revisions to EPA.

In early 1986, negotiations between officials of EPA Region I and Massachusetts and General Motors took place.

On July 7, 1987, General Motors shut down the Framingham paint facility, about two months before the Massachusetts state law deadline of August 31, 1987, and almost six months before the Congressionally mandated attainment date for ozone of December 31, 1987. 42 U.S.C. § 7502(a)(2) (1982).

On August 17, 1987, the United States filed an enforcement action against General Motors for operation of Framingham facility after December 31, 1985.

ARGUMENT

A. Enforcement by EPA is Barred.

The *amicus curiae* agrees with the argument of the Petitioner, that enforcement by EPA is barred as a result of its failure to disapprove the SIP revisions within the four month period. Additionally, in the circumstances of this case, equity bars enforcement by EPA of the original SIP to protect General Motors from the jeopardy of conflicting enforcement by two sovereigns, and by the application of principles of equitable estoppel.

B. The Massachusetts Revisions Constituted Binding State Law, Enforceable by the Commonwealth of Massachusetts against General Motors.

In the Clean Air Act, 42 U.S.C. 7401 *et seq.*, Congress made its intention abundantly clear that the states retained their police power to regulate in this area, subject only to specified restrictions. The findings enacted by Congress include one that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments...." 42 U.S.C. § 7401(a)(3) (1982). The purposes of the Clean Air Act are stated to include the provision of "technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs;...." 42 U.S.C. § 7401(b)(3). Only in a narrowly defined range of circumstances is state regulation displaced in favor of federal regulation. 42 U.S.C. § 7416. Under that section, Congress has expressly left to the states the authority to regulate in the areas not mentioned as being exclusively within the federal domain.

In circumstances such as those underlying this case, in which an emission standard or limitation is in effect under an applicable state implementation plan (SIP), the state retains the authority to adopt and enforce emission standards and limitations provided that they are no less stringent than those under the existing plan. 42 U.S.C. 7416. The issue of what is more or less stringent is to be determined by reference to the national ambient air quality standards (NAAQS) and the Congressionally mandated attainment date. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981).

In this case, Massachusetts, in exercise of these retained powers, adopted an air emission standard and schedule and submitted it to EPA as a revision to its existing SIP, as being no less stringent than the standard or limitation under the existing SIP. While one component of the revision had the effect of extending the date of compliance with the old standard which was provided in the existing SIP, this fact by no means leads to an inevitable conclusion that the Massachusetts revision was less stringent than the existing standard. The standard under the submitted revision required a lowering of emission levels. The revision was technology forcing, as evidenced by General Motors' construction of a new, lower emission facility. The revision required compliance with the applicable national standard by the Congressionally mandated attainment date.

The United States in this case seems to rely on *dictum* of this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), to support the contention that notwithstanding the express state authority to adopt its own requirements without EPA involvement, the existing SIP stipulates the only applicable law until a revision is approved by both the state and EPA. Brief for the United States in Opposition at 2 and 11. Such reliance is misplaced. While it may be accurate to state that a revision does not become part of the SIP which is enforceable by EPA until it is approved by both the state and EPA, and that timely EPA disapproval may preempt inconsistent state regulation for the future, the state is acting within its retained authority when it adopts a standard no less stringent than that under the existing SIP, and that new standard constitutes a legally binding obligation of persons subject to the jurisdiction of the state, enforceable by the state, as a matter of state law. Until such

time as EPA disapproves state revision regulations, the source is thus exposed to two enforcement directions: state (under its revised regulations) and EPA (under the existing SIP). The requirement that EPA act on state revisions within four months in part mitigates the potential dilemma and burden thus imposed on the source. In the absence of timely EPA disapproval, equity bars enforcement by EPA.

Moreover, *Train* is distinguishable from the instant case on its facts. This Court spoke in *Train* in the context of EPA action on a SIP variance, and placed emphasis on the source's right to seek court review of any disapproval. In the present case the EPA took no formal action for a protracted period of time. Until such time as the EPA did act, General Motors had no opportunity to seek court review of that action, but was bound to comply with Massachusetts law.

Moreover, federal preemption theory does not lead to the conclusion that the Massachusetts regulations are invalid in light of the standard contained in the existing SIP, as the United States apparently suggests by its citation of *Train*. Federal preemption of state law "is not to be lightly presumed." *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). In that case, this Court noted three instances in which federal law may preempt state law. Firstly, Congress may preempt state law expressly. Secondly, Congressional displacement intent may be inferred where a comprehensive scheme of federal regulation leaves no room for supplementary state regulation. Thirdly, federal law may preempt state law if the latter actually conflicts with the former. *Id.* Such conflict may arise because compliance with both is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because state law stands

"as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

None of these instances applies in the context of the Clean Air Act. Congress has not expressly pre-empted the states except in those few areas enumerated in the Act. 42 U.S.C. § 7416. Other than in those, Congress has evinced its intention that the states retain authority. Congress has not legislated in such a way as to preclude supplementary state regulation. To the contrary, the scheme of the Clean Air Act contemplates state supplementary regulation. Lastly, absent appropriate EPA disapproval, the Massachusetts regulations do not actually conflict with federal law as they comport with its retention of state authority, imposing standards no less stringent than those contained in the existing plan. The fact that the Massachusetts regulations extend the compliance deadline of the existing SIP does not necessarily lead to a contrary conclusion. *See Florida Power & Light*, 650 F.2d at 587. Nor did the Massachusetts regulations hinder the attainment of Congressional objectives, as they did provide for the attainment of the national standard within the Congressional timetable. That EPA might have done things differently has no relevance in the context of preemption, as it is the objectives of Congress, not EPA, which are to be achieved.

C. The United States is Estopped from Enforcing the Existing SIP.

Under the state-federal relationship established by the Clean Air Act, state action can fall into one of three categories. Firstly, state action may be expressly excluded. 42 U.S.C. § 7416. Secondly, action may be taken under state police powers which existed under the

Constitution before enactment of the Clean Air Act, and which are retained by the state pursuant to Congressional intent. *Id.* Thirdly, state action may be taken in areas in which Congress has assumed federal authority, but has delegated that authority back to the states. *See* 42 U.S.C. § 7410(a)(1) (1982). Congress has delegated this authority to the states because of, and in acceptance of, their unique attributes as sovereigns, including their existing governmental and enforcement apparatus. State responsibility to establish, administer and revise SIPs falls within the third category. *See* 42 U.S.C. §§ 7407(a) and 7410 (1982); *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975).

State actions which fall within the third category are in the nature of federal actions. To the extent that they are taken by the states *qua* federal agents under Act of Congress, they are cloaked with federal authority unless such authority is revoked by or under the authority of Congress, and are of at least equal dignity with the actions of EPA. In the circumstances of this case, Massachusetts was acting in part as an agent of the federal government under authority delegated to it by Congress. 42 U.S.C. §§ 7410.

The concept of the states acting as agents of the federal government has been recognized in the context of environmental legislation. In *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986), the Court of Appeals of Oregon noted that the states, in passing on applications for certificates under the federal Clean Water Act, 33 U.S.C. § 1341 (1982), "act in part as agents of the federal government." 717 P.2d at 1278, n.4. *See also, W.W. Dean & Assocs. v. City of San Francisco*, 188 Cal. App. 3d 1330, 234 Cal. Rptr., 51, 58 (1987) (city acted as an administrative agent of the state and federal

governments in implementing the Endangered Species Act, 16 U.S.C. § 1531 (1982)); *but see Mianus River Preservation Committee v. Administrator, Environmental Protection Agency*, 541 F.2d 899, 906 (2d Cir. 1976) (states not relegated to the status of enforcement agents for the executive branch of the federal government under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1369(b)(1)(F)(Supp.IV), and therefore free to enact requirements no less stringent than the federal standards.)[2]

The concept of non-federal persons acting as federal agents has been recognized by this Court in other contexts. In *Dixson v. United States*, 465 U.S. 484 (1984), this Court held officers of a private non-profit corporation administering and expending federal development block grants to be "public officials" acting "for or on behalf of the United States" for purposes of the federal bribery statute, 18 U.S.C. § 201(a) (1982).

This Court has never decided that the United States may not be estopped. The Court has declined to state a rule that

> there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government.

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[2]Far from relegating the states to a subsidiary role, the Clean Air Act elevates the states by insulating them from claims of federal preemption when acting within the scope of the authority delegated by Congress. In exercising their delegated authority, the states are acting as agents of the Congress, not as agents of the executive branch. *Cf. Mianus*.

Heckler v. Community Health Services of Crawford, 467 U.S. 51, 60-61 (1984) (emphasis in original).

Estoppel requires the reasonable reliance by one party, to its detriment, upon the misrepresentations of another. *See Lyng v. Payne*, 476 U.S. 926 (1986); *Heckler* at 59; *United States v. Arkwright, Inc.*, 690 F. Supp. 1133 (D.N.H. 1988). In the present case, General Motors relied upon representations made on behalf of and under the authority of the United States by EPA and Massachusetts. Those representations were made in EPA's 1981 release, in the revisions granted by Massachusetts in 1985, by EPA's failure to disapprove the revisions in a timely fashion and by EPA's continuing negotiations with Massachusetts and General Motors after approval by Massachusetts of its revisions.[3]

Such reliance was reasonable given the level of authority at which representations were made to General Motors. This is not a case in which General Motors relied upon representations of an agent of dubious authority. *Cf. Heckler*; *Arkwright*. General Motors relied on EPA's guidelines published in the Federal Register, and on formal actions taken by the Commonwealth of Massachusetts on behalf of the United States pursuant to authority delegated directly to it by Congress in the Clean Air Act.[4] Moreover, that this reli-

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[3]Even if the nature of the state's actual authority as agent is characterized as constrained in some way by a requirement of EPA approval, EPA ratified the Massachusetts revisions by its actions and by its failure to timely disapprove the revisions in this case. In any event, so far as the regulated source is concerned, the state acted within the scope of its apparent authority as agent.

[4]In addition, such actions were taken by Massachusetts on its own behalf, *qua* state, under its retained police powers.

ance was reasonable in the absence of disapproval of the Massachusetts revisions by EPA, at least after the expiration of the four month period, is supported by the significance attached to the four month period by the courts in *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983), *Council of Commuter Orgs. v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); and *United States v. Alcan Foil Prods.*, 694 F. Supp. 1280 (W.D. Ky. 1988), *aff'd in part and rev'd in part*, 889 F.2d 1513 (6th Cir. 1989).

General Motors' detriment is evidenced by its expenditure of over $200 million on a new facility and its closing of the Framingham plant, which were actions taken by General Motors in reliance on the Massachusetts revisions.

General Motors' right to equitable relief is not outweighed by any public interest in belated enforcement by EPA. *Cf. Arkwright*. The public interest has been fully served by the actions of the Commonwealth of Massachusetts on behalf of the public, and by timely compliance with the NAAQS by General Motors before the Congressionally mandated attainment date, and before EPA instituted its enforcement action.

CONCLUSION

EPA enforcement of the existing SIP is barred in this case as a result of EPA's failure to exercise its duty to timely disapprove the Massachusetts revisions. Equitable principles also bar enforcement to protect the regulated source from the iniquitous results of inconsis-

tent enforcement powers of two sovereigns, and by the application of estoppel.[5]

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[5]The intention of Congress that the federal courts should exercise equity jurisdiction in the context of granting modifications of requirements to avoid hardship under the Clean Air Act is evinced by the Act itself. *See* 42 U.S.C. § 7410(i); Currie, *Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments*, 78 U. Mich. L. Rev. 155, 202 (1979).